SUBRAMANIAM v. RAJARATNAM

[C. A. (Mathew C.J., Wilson and Good JJ.) January 20, 1956]

[K. L. — F.M. Civil Appeal No. 35 of 1955]

Will — Whether testatrix knew and approved of contents of the will — Undue influence — Burden of proof.

This was an appeal against the order of the High Court granting probate of a will to the respondent. On appeal it was argued that (i) the circumstances of the preparation of the will and its execution were so suspicious that the only reasonable conclusion was that the will did not express the mind of the testatrix, and (ii) the learned trial Judge was wrong in holding that the burden of proof of undue influence lay on the defendant-appellant.

Held: (1) on the evidence the learned trial Judge could not have come to any other conclusion than that the instrument in question was the last will of a free and capable testatrix;

(2) once the plaintiff-respondent had proved that the testatrix knew and approved of the contents of the will, the burden was on the defendant-appellant to prove undue influence and this he had failed to prove.

Cases referred to:—

(1) *Barry v. Butlin* 2 Moo. P.C. 480.

(2) *Tyrrell v. Painton* (1894) P. 151.

(3) *Fulton v. Andrew* L.R. 7 H.L. 448.

(4) *Brown v. Fisher* 63 L.T. 465.

COURT OF APPEAL

Ng Ek Teong for the appellant.

K. J. E. T. Marsh for the respondent.

Mathew C.J. (delivering the judgment of the Court) : — This is an appeal against an order of the High Court granting probate of a will to the respondent. The learned trial Judge found that the will had been established.

The defendant-appellant in the Court below relied on two main grounds for opposing the grant of probate to the respondent : —

(i) that the testatrix did not understand the terms of the will which she executed on 9th February 1952 and, had she done so, she would not have executed it; and

(ii) that the deceased was under the influence of the plaintiff when she executed the will and that the said will is not the expression of the will of the deceased.

The respondent, who was one of the sons of the testatrix, had for many years lived together with his wife in the house of the testatrix and had cared for her in her declining years. The main bequest in the will was the bequeathal to the respondent of the house in which they all lived.

The will was prepared by an Advocate and Solicitor, Mr. Yong Kung Lin, on instructions given to him by the respondent, which instructions were typewritten. He went some days later to the testatrix's house and there, in the presence of one Subramaniam whom he asked to explain the will to the testatrix, the will was executed.

Mr. Ek Teong for the appellant has carefully analysed the evidence and has submitted that the circumstances of the preparation of the will and its execution are so suspicious that the only reasonable conclusion is that the will does not express the mind of the testatrix, but is a will prepared by the respondent which he induced the testatrix to execute, she not being aware of its contents. The suspicious circumstances may be summarised as follows :—

(a) The will was prepared by the solicitor on the instructions of the respondent.

(b) The witness and interpreter Subramaniam was at the house not accidentally but by pre-arranged plan.

(c) The will was not explained to the testatrix because there is no reliable witness on this point.

(d) The money bequests were a clever invention of the respondent to give veri-similitude to the will.

(e) Why was it necessary to insert a declaration in the will to the effect that the respondent had bought the plot of land and built the house with her own money?

Mr. Ek Teong submits that had the learned trial Judge fully considered the evidence before him, he must have held that the respondent had failed to remove the suspicion that was there.

The learned trial Judge found that Subramaniam was a reliable witness, and found as a fact that the testatrix understood what she was about to execute. If the criticism of Subramaniam's evidence is accepted, then we must be forced to the conclusion that :—

(a) he was in league with the respondent to induce the testatrix to execute a will she had no intention of executing, and

(b) that she never had the contents explained to her.

In fact, Subramaniam was never cross-examined on the basis that his story was bogus from beginning to end and, indeed, in his closing address before the learned trial Judge, the counsel for the defendant concentrated on the suspicious behaviour of the respondent with a view to establishing undue influence.

No adverse comments were made on the evidence of Subramaniam. Whether he was there by accident or by design was not pursued in the Court below, and it is quite possible that months after the incident Subramaniam's recollection or, indeed, that of Mr. Yong Kung Lin (his solicitor) was defective. It is extremely difficult to recollect the exact order and time of arrival of persons on the occasion of an incident which occurred many months before. Mr. Ek Teong has said that the evidence of Mr. Yong Kung Lin as to what occurred when the will was explained is not conclusive. We are unable to agree with this submission. Mr. Yong Kung Lin asked the testatrix

specifically whether she understood the will and she said she did. The fact that in reply to a question he said "she appeared to understand all" does not in our view diminish or throw doubt on the answer he first gave about asking her in Malay whether she understood the will. On the evidence of Mr. Yong Kung Lin, Mr. Subramaniam and the doctor the learned trial Judge could not have come to any other conclusion than that (to quote the words of Parke B. in *Barry v. Butlin*[1]): "the instrument so propounded was the last will of a free and capable testator." As regards the testatrix's capacity, the medical evidence establishes beyond doubt that, though old and feeble, she was in full possession of her mental faculties.

Mr. Ek Teong has further submitted that the learned trial Judge was in error in holding that the burden of proof of undue influence lay on the defendant-appellant. The law is set out in *Theobald* on Wills, 10th ed. as follows (at p. 26):—

"Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. The fact that the will is prepared by or on the instructions of the person taking a benefit under it is a circumstance raising such suspicion. To invalidate such a will, however, there must be evidence of the actual exercise of some undue influence. And the influence of a person standing in a fiduciary relation to a testator may lawfully be exercised to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and the burden of proof of undue influence lies upon those who assert it."

In *Tyrrell v. Painton*[2], Lindley L.J. says (p. 157):—

"The rule in **Barry** v. **Butlin**[1], **Fulton** v. **Andrew**[3], and **Brown** v. **Fisher**[4], is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

In our view, the plaintiff-respondent proved affirmatively that the testatrix knew and approved of the contents of the will, and the appellant failed to prove undue influence. The appeal was accordingly dismissed with costs.

Appeal dismissed.

DOWSE v. DOWSE

[Divorce Jurisdiction (Rigby J.) July 6, 1956]

[Penang — Divorce Petition No. 8 of 1955]

Divorce — Collusion — Attempt by husband to induce wife to refrain from defending the petition.

In this case the learned Judge, on the application on behalf of the Attorney-General, found that there had been collusion in obtaining a decree of divorce, in that the husband had induced the wife by a money payment to refrain from defending the petition. The learned Judge rescinded the decree *nisi* and ordered the petitioner to pay the costs of the intervention by the Attorney-General.

Case referred to:—

(1) *Lowndee v. Lowndee* (1950) P. 231.

DIVORCE.

F. G. Pooley for the petitioner.

O. L. Phipps for the respondent.

F. G. Cooke (Federal Counsel) for the Attorney-General.

Rigby J. (delivering oral judgment): — This is an application, on behalf of the Attorney-General, Federation of Malaya, to rescind a *decree nisi* granted to the Petitioner by this Court on the 8th February, 1956. On the evidence as disclosed in the Attorney-General's application it seems to me abundantly clear that there was a deliberate attempt in this case by the Petitioner to induce his wife, by a money payment, to refrain from defending the petition. In the words of Willmer J. in the case of *Lowndee v. Lowndee*[1]:—

"That appears to me to amount to no more and no less than an attempt to obtain the judgment of this Court not on the merits of the case, but rather by way of arrangement between the two parties. And an arrangement whereby the husband is to obtain his freedom irrespective of the merits of the case strikes me as being clearly something which does in fact tend to pervert the course of justice.

The *decree nisi* is rescinded. The petitioner will pay the costs of the intervention made by the Attorney-General.

Perhaps I ought to add that I am fully satisfied after having seen the correspondence as disclosed in the application by the Attorney-General and the answer thereto, that the petitioner's Solicitors were in no way concerned with the attempt at collusion made by the petitioner.

Costs to be taxed, if not agreed.

Order accordingly.